Free Speech on Private Property

Adapting a Set of Fundamental Rights Under the New Jersey Constitution

By Bruce S. Rosen and Brittany Burns

For the first time anywhere in the United States, an appellate court has ruled that...private communities are 'constitutional actors' and must therefore respect their members' freedom of speech. The Court recognized that just as shopping malls are the new public square, these associations have become and act, for all practical purposes, like municipal entities unto themselves.

Prof. Frank Askin following the N.J. Supreme Court's 2007 decision in *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n.*[1]

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Free speech is a fundamental right, but it is not absolute under either the First Amendment to the United States Constitution or Article I of the 1947 New Jersey Constitution.[2] Yet, beginning the mid-1970s, New Jersey, like California and a handful of other states, has been an outlier in applying its own constitution to expand rights in many areas, not the least of which has been application of free speech principles in the face of private property rights.[3]

The New Jersey Supreme Court's 1980 decision in *State v. Schmid*,[4] authored by Justice Alan Handler, described Article I as "more sweeping in scope than the First Amendment."[5] The Court declared unconstitutional Mr. Schmid's arrest for distributing handbills on the Princeton University campus. In doing so, the Court took a cue from a United States Supreme Court decision which had simultaneously limited free speech rights under the federal constitution while ruling that a state's organic and general law can independently furnish a basis for protecting individual rights of speech and assembly.[6] That case stemmed from an appeal of a California Supreme Court decision which declared that state's constitution protects speech and petitioning, reasonably exercised, in privately-owned shopping centers, and that these state constitutional provisions do not violate the owner's federal constitutional rights.[7]

Schmid, which dealt with visitors to a private campus with considerable public access, focused the Court on attempting to "achieve the optimal balance between the protections to be accorded private property and those to be given to expressional freedoms exercised upon such property."[8] In doing, so the Court concluded that:

> [T]he State Constitution furnishes to individuals the complementary freedoms of speech and assembly and protects the reasonable exercise of those rights. These guarantees extend directly to governmental entities as well as to persons exercising governmental powers. They are also available against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property. The State Constitution in this fashion serves to thwart inhibitory actions which unreasonably frustrate, infringe, or obstruct the expressional and associational rights of individuals exercised under Article I, paragraphs 6 and 18 thereof.[9]

The Court fashioned a standard in *Schmid* that it built upon in subsequent cases, which considers (1) the nature, purposes, and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property. "This is a multifaceted test which must be applied to ascertain whether in a given case owners of private property may be required to permit, subject to suitable restrictions, the reasonable exercise by individuals of the constitutional freedoms of speech and assembly."[10]

Enter the late Rutgers Law School Professor (and founder of the school's Constitutional Litigation Clinic) Frank Askin, who, with a variety of co-counsel and the backing of the American Civil Liberties Union-New Jersey, filed a series of cases over more than two decades which ultimately expanded the *Schmid* free speech precedent into shopping malls and housing developments where many New Jerseyans live and gather.

Askin and his team's first major foray into the area was the 1994 decision in *New Jersey Coalition Against the War in the Middle East v. J.M.B. Realty Corp.*,[11] where the New Jersey Supreme Court applied the State Constitution's free speech and assembly provisions to permit reasonable free speech and assembly at privately-owned regional shopping malls after individuals there sought to hand out leaflets and discuss their opposition to the Iraq War.

The Court held that even though regional shopping malls were privately owned, they provided the public with an "all-embracing invitation,"[12] to shop or browse, similar to a public downtown. The Court found that each of the elements of the *Schmid* test were met but added the requirement that there be a balancing of "expressional rights and privacy rights,"[13] which was mentioned in *Schmid*. Although the Court went well beyond any federal precedent, it attempted to draw similar principles from U.S. Supreme Court cases, as described and summarized in Justice Thurgood Marshall's dissent in *Hudgens v. NLRB,*[14] stating "where private ownership of property that is the functional counterpart of the downtown business district has effectively monopolized significant opportunities for free speech, the owners cannot eradicate those opportunities by prohibiting it."[15] However, the Court's largess was expressly limited to large regional shopping centers ("[n]o highway strip mall, no football stadium, no theatre, no single high suburban store, no stand-alone use, and no small to medium shopping center").[16]

Six years later, in 2000, the Court applied the same tests to strike down a mall's demands that the Green Party obtain a $1 million insurance policy, sign a hold harmless agreement, and limit their leafleting to a handful of days. The Court said that while it had in *Coalition* granted malls "extremely broad powers"[17] to promulgate reasonable regulations concerning time, place, and manner of leafleting, it "did not intend that these regulations would prevent the exercise of expressive activities."[18]

Askin's team then moved its focus to free expression in the housing context, such as planned unit developments such as condominium complexes where the plaintiffs were owners, not visitors. In the 2007 decision in *Comm. For A Better Twin Rivers v. Twin Rivers Homeowners' Ass'n,* the Court applied the *Schmid* and *Coalition* tests to uphold regulations against placement of signs, use of a community room, and access to a community's newspaper were "reasonable time, place and manner restrictions."[19] However, the Court then went out of its way to recognize plaintiffs in these settings as constitutional actors and it ruled restrictions by a private community association must be reasonable, and such challenges may be valid and may yet be successful, and then laid out a roadmap for non-constitutional "common interest"[20] challenges to similar regulations.

In 2012, the Askin team's *amicus* arguments won a larger victory where a condominium owner's political signs in his unit's windows were analyzed in the context of a complete ban on residential signs and the prohibitions were struck down. The Court, in a decision by Chief Justice Stuart Rabner, determined that because the plaintiff's property rights and free speech rights outweighed the homeowner's association's no-sign rules, it declared the restriction written into the restrictive covenants in the deed to be "unenforceable."[21] Two years later, Chief Justice Rabner again found for the plaintiff, again supported by Askin's *amicus* brief for the ACLU, in the case of a high-rise apartment owner who was prohibited from distributing campaign materials as part of his run to be a board of directors member.[22] The Court surveyed all of its free speech/private property cases and clarified that for residents of a "private common-interest community,"[23] courts should focus on the *Schmid* prong concerning "the purpose of the expressional activity undertaken"[24] in relation to the property, and should also consider the "general balancing of expressional and property rights."[25] In that case, the Court pointed out that rather than create reasonable time, place, and manner restrictions, the association simply banned distribution of campaign materials, which the court ruled was unreasonable.

Askin retired shortly after that case and died in 2021, these cases being part of his multifaceted legacy of battles for constitutional rights. In the place where these concepts were incubated, however, the situation has become more restrictive: California's far more conservative Supreme Court has since narrowed its original *Pruneyard* decision, narrowing a state regulation allowing a right of a union to picket in shopping centers to plazas, atriums, and food courts,[26] and the U.S. Supreme Court has gone even further, ruling that a California regulation allowing an agricultural union access to an employer's property for unionization efforts was a taking that required compensation.[27] Although these issues have not come back to the fore in New Jersey, they can still be teed up at any time; as it stands, however, Chief Justice Rabner's Court does not seem likely to follow suit. ■

Endnotes

1. 190 N.J. 344 (2007).
2. Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.... The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances. N.J. Const. (1947), Art. 1, ¶¶1, 6, & 18.
3. Since then many states have retreated from these positions and required state action before rights can be enforced. See *Comm. For A Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 192 N.J. 344, 363-64 (2007).
4. 84 N.J. 535, 557 (1980).
5. *See id.* at 557 (1980).
6. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).
7. 23 Cal.3d 899.
8. 84 N.J. 535, 561 (1980).
9. *See id.* at 560.
10. *See id.* at 563.
11. *N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 138 N.J. 326 (1994).
12. *See id.* at 355.
13. *See id.* at 362.
14. 424 U.S. 507 (1976).
15. 138 N.J. 366.
16. *N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 138 N.J. 326 (1994).
17. *Green Party of N.J. v. Hartz Mountain Indus., Inc.*, 324 N.J. Super. 192, 217-218 (App.Div. 1999) (quoting *N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 138 N.J. 326 (1994).
18. *Ibid.*
19. 192 N.J. 344 (2007).
20. *Ibid.*
21. *Mazdabrook Commons Homeowners' Ass'n v Khan*, 210 N.J. 482 (2012).
22. *Dublirer v.2000 Linwood Avenue Owners, Inc.*, 220 N.J. 71 (2014).
23. *Ibid.*
24. *See id.* at 74 (2014).
25. *Ibid.*
26. *Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8*, 55 Cal.4th 1083 (2012).
27. *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021).